86-63

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

B.P. NORTH AMERICA PETROLEUM, INC.,
Petitioner,

v.

WAY WISER NAVIGATION CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In this maritime in rem vessel arrest proceeding the District Court for the Northern District of California ordered respondent to pay to petitioner herein, (plaintiff below), a portion of its attorneys' fees for extraordinary services rendered by petitioner's counsel to preserve and maintain respondent's vessel during impoundment, which necessary services benefitted a wide variety of parties and non-parties. The fees were awarded under the equitable "Common Fund" exception to the traditional "American Rule" which countermands awards of counsels' fees to successful litigants in admiralty actions absent an express statutory or contractual provision. The United States Court of Appeals for the Ninth Circuit reversed the District Court's Order and award, relying chiefly on this Court's holdings in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975); and *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970), ruling that the Common Fund award constituted an abuse of discretion.

The Appellate Court, while recognizing the District Court's wide latitude in fashioning equitable awards of attorney's fees, based reversal on its finding that the award of counsels' fees did not operate to spread the cost proportionately among an identifiable class of beneficiaries, citing *United States v. Imperial Irrigation District,* 595 F.2d 525, 529 (9th Cir., 1979) as authority for this position, a decision involving the related "Substantial Benefit" exception to the traditional rule.

The question presented is, under the equitable Common Fund doctrine set forth in the *Alyeska Pipeline Service Co.* decision, whether the District Courts, notwith-

standing the wide latitude and discretion available to them in fashioning equitable awards of attorneys' fees, may be strictly confined in the exercise of that discretion by formal rather than substantive factors of predecessor rulings, and whether relatively minor deviations from those narrow constraints are an abuse of discretion. A related issue is whether the Ninth Circuit erred by applying Substantial Benefit guidelines and standards to reverse a Common Fund fee award.

RULE 28.1 STATEMENT

Petitioner B.P. North America Petroleum, Inc., represents to this Court that it has changed its name from B.P. North America Trading, Inc., said name change having been effected subsequent to the circumstances and occurrences supporting this petition. Petitioner is, and at all times relevant has been, a wholly owned subsidiary of B.P. North America, Inc. Petitioner has no subsidiaries other than wholly owned subsidiaries.

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No. _____

In The
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B.P. NORTH AMERICA PETROLEUM, INC.,
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v.

WAY WISER NAVIGATION CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner B.P. NORTH AMERICA PETROLEUM, INC. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on March 12, 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals, issued March 12, 1986 is reported at 784 F.2d 975 and is reproduced as Appendix A. The District Court's written Order Granting Plaintiff's Application for Attorney's Fees, filed November 9, 1984, is unreported and is reproduced as Appendix B. The Court of Appeals' Minute Order denying Petitioner's Petition for Rehearing, dated April 18, 1986 is reproduced as Appendix C.

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JURISDICTION

The Court of Appeals' Opinion was filed March 12, 1986 and its Order Denying Petition for Re-Hearing was filed April 18, 1986. This Petition is filed within ninety (90) days of that date. This Court has jurisdiction to review the judgment in question by Writ of Certiorari under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1., Jurisdiction of Court—

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of

the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

—o—

STATEMENT OF THE CASE

On August 29, 1984, B.P. NORTH AMERICA PETROLEUM, INC., ("Petitioner") filed its Complaint in Rem in the U.S. District Court for the Northern District of California, seeking admiralty arrest of Respondent WAY WISER NAVIGATION CORP.'S ("Respondent") vessel of Taiwanese registry, the M/V PANAMAX NOVA, (the "Vessel"), invoking admiralty jurisdiction under Article III, Section 2, Clause 1 of the United States Constitution and pursuant to 46 U.S. Code § 971 and Federal Rules of Civil Procedure Supplemental Admiralty Rule C(1)(a). (CR 1, 5)* Process was executed against the

* CR signifies reference to the Clerk's Record before the Ninth Circuit which shall forthwith be certified and transmitted to the Clerk of this Court pursuant to Rule 19.1.

Vessel in the San Francisco Harbor by the U.S. Marshal's Service on September 7, 1984.

Prior to entering San Francisco Harbor the Vessel had been lying at anchor off the California coast, just beyond the Marshal's jurisdiction, for approximately 40 days. (CR 27) The Vessel was out of food and water and was carrying a volatile bulk cargo of soft coal, which for chemical reasons presented a serious risk of spontaneous combustion, thereby creating a danger to the integrity of the Vessel, the lives of the crew, and the welfare of the coastal and inland waterways. The Vessel's crew had not received wages from Respondent for approximately 9 months and was beset with serious morale problems. (CR 7) The situation received extensive local and national media coverage, and assumed aspects of an international incident. (CR 8-10, 27) After forty days at off-shore anchorage, the Vessel entered port, at which time the In Rem Warrant of arrest was executed and a prolonged impoundment commenced.

The Complaint and process were filed and executed pursuant to a maritime lien held by Respondent for unpaid bunker fuel bills dating from May of 1984. (CR 7) Respondent, although advised of the situation from prior to the arrest, and despite the known fact that the crew was under dire hardship and the cargo was in danger of igniting, waited over two weeks before appearing, during which time expenses incurred in caring for and provisioning the Vessel were borne entirely by Petitioner. Much work was performed by Petitioner's counsel during this period certain of which extended beyond the mere provision of strictly legal services necessary to protect their client's

interests. Respondent failed to appear and take responsibility for the Vessel until the situation had so deteriorated that an expedited court supervised sale of the Vessel and its cargo was being considered to mitigate the problems and defray expenses. (CR 1) Subsequent to appearance by Respondent the matter of the unpaid bunker fuel bills was resolved between the parties and the Vessel was released from attachment. (CR 23)

Much special attention by counsel for Petitioner was required in administering to the needs and safety of the Vessel, including employing a ship's agent for provisioning and related services, and arranging stevedoring services for safe restowage of the coal cargo. Petitioner's counsel also assisted in negotiations between the Vessel's crew and their local consulate concerning immigration and nationality issues, in addition to providing Mandarin Chinese/English translation services, all of which was necessary to properly tend and preserve the Vessel, the crew and cargo, as well as to protect the harbor environs. (App. B-3)

The District Court found that the circumstances surrounding the arrest of the vessel were "exceptional". (App. B-2) The District Court further found that petitioner's counsel furnished many necessary services which benefited the Vessel, its crew, the cargo and even Respondent. (App. B-3) The District Court, in awarding a portion of Petitioner's counsel's fees for these services, relied heavily on this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), holding that petitioner's counsel provided "many necessary and beneficial services" during the impoundment which

preserved the common fund. (App. B-3) The District Court's Order accordingly compensated petitioner's counsel for these specific services under the Common Fund doctrine. (App. B-2)

The Ninth Circuit distinguished between the Common Fund and Substantial Benefit theories by the fact that, under the latter, attorneys' fees are only recoverable where the award will operate to spread the cost proportionately among the members of an ascertainable class. (App. A-5) This requirement was apparently adjudged to be absent from the Common Fund exception. Regardless, the Ninth Circuit employed this standard as its primary grounds for reversal.

REASONS FOR ALLOWANCE OF THE WRIT

I

THE NINTH CIRCUIT'S RULING MISAPPLIES THE CLEAR PRECEDENTS OF THIS COURT IN THE ALYESKA AND MILLS DECISIONS THUS REQUIRING CORRECTION OF ITS RESULT AND CLARIFICATION OF THE LAW REGULATING THESE EQUITABLE DOCTRINES.

A. Uncertainty Exists As To The Nature And Application Of The Common Fund And Substantial Benefit Doctrines Which Uncertainty Led The Court Of Appeals To Its Incorrect Reversal.

The guidelines are unclear for granting or denying applications for attorneys' fees under either the Common Fund or Substantial Benefit doctrines. Some uncertainty in the application of these doctrines is endemic, due main-

ly to the latitude and discretion afforded to the District Courts in their exercise of equity jurisdiction. *Precision Co. v. Automotive Co.,* 324 U.S. 806, 815 (1944); *Alyeska Pipeline Service v. Wilderness Society,* 421 U.S. 240, 257 (1975). The Ninth Circuit, however, misconstrued this uncertainty to impermissibly confine and disallow the equitable award of fees by the District Court. An example of the confusion experienced by the Court of Appeals is found in their comparison of the Common Fund and Substantial Benefit doctrines (App. 4-5). The Ninth Circuit states that the Substantial Benefit doctrine may only be applied where members of the benefited class stand in a position to contribute to the award. The Court noted no such restriction on Common Fund awards. Nonetheless, the Ninth Circuit found that the Substantial Benefit rule is "less restrictive," than its progenitor the Common Fund exception, whereas by its imposition of the class contribution requirement, it is actually and substantially more restrictive. The Common Fund exception is clear and simple. Under it, "the trustee of a fund or property, or a party preserving or recovering a fund for others in addition to himself" may recover attorneys' fees expended to secure such a fund. *Alyeska,* 421 U.S. at 257.

The Ninth Circuit's Decision hereunder (App. 1) relies on *United States v. Imperial Irrigation District,* 595 F.2d 525 (9th Cir. 1979) in support of its ruling that the District Court's award was an impermissible abuse of discretion, finding that the beneficiaries of Petitioner's action did not comport with the class contribution requirement. The *Imperial Irrigation* case, however, involves a ruling by the Ninth Circuit solely based on the Substantial Benefit exception to the traditional rule and nowise inter-

prets or confines the Common Fund theory and thus does not control.[1]

Since the District Court's Order granting Petitioner's application for attorneys' fees speaks only of the Common Fund exception and omits mention of either the Substantial Benefit theory or the *Mills v. Electric Auto-Lite* decision which gave rise to it (App. B), reliance on the *U.S. v. Imperial Irrigation* decision in overruling the award is unjustified and wholly inapposite. The Ninth Circuit has clearly failed to adequately distinguish between the two theories and has erred by invoking a standard applicable to the wrong one.[2]

Even had the Substantial Benefits theory applied to this case the doctrine as set forth in the *Mills* case and restated in *Imperial Irrigation* (at 529), is based on the sound reasoning that identifiable persons who benefit substantially from the actions of the parties seeking fees should share the cost, but, that since those beneficiaries are frequently not parties or members of a certified class before the Court, there must be a party before the Court against whom the court may assess fees who stands in a relation to that benefited class and who will spread the award proportionately. Here, the actual defendants and primary recipients of benefits were Respondent and its Vessel. The other beneficiaries were the Vessel's crew, its cargo (owned

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[1] The Court, in Imperial Irrigation, at p. 529 (Fn. 3) clearly established that Appellants therein did not seek fees on the Common Fund theory from which the Substantial Benefit theory derives.

[2] The Ninth Circuit found that the District Court relied on a "Combination" of the Common Fund and Substantial Benefit doctrines. (App. A-4)

by a third party), other creditors of the Vessel (CR, 21) and the San Francisco Harbor. Under the Common Fund exception and due primarily to equitable considerations, the specific makeup of this group is largely immaterial to recovery by Petitioner from Respondent, which the Common Fund exception permits.

The Ninth Circuit's misplaced reliance on the particular constraints invoked to regulate Substantial Benefit awards, as set forth in the *Mills* and *Imperial Irrigation* cases, where the actual award was clearly and demonstrably ordered under the predecessor Common Fund doctrine, evidences the Court's confusion in allowing the two theories to be applied interchangeably, even where patent differences exist in their evolution and reasoning. This Court must clarify this area of law and instruct the Ninth Circuit to apply only those restrictions which are incident to the proper theory.

B. The Ninth Circuit's Decision Is An Unwarranted Extension Of Present Case Law, Which Overly Confines The Equity Jurisdiction Allowed The District Courts And Conflicts With Decisions Of Both This Court And The Ninth Circuit.

The judicial exceptions to the traditional rule prohibiting attorneys' fees absent a statute or contract, have been based upon the equitable powers of the Courts. *Sprague v. Ticonic National Bank,* 307 U.S. 161, 166 (1939). The District Courts are vested with broad authority to award attorneys' fees when "overriding considerations of justice seem to compel such a result." *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718 (1967).

The Ninth Circuit's ruling hereunder ignores the very equitable principles which gave rise to the Common Fund exception and its eventual progeny, the Substantial Benefit theory.[3] The decision has the dangerous effect of impermissibly confining the scope of equitable discretion in attorneys' fees awards by requiring the Courts to restrict their rulings under the Common Fund exception so as to conform them with the more restrictive requirements only applicable to the related but distinguishable Substantial Benefit theory.

The Common Fund exception initially required that a class of beneficiaries exist to share the expenses of suit, [*Central Railroad and Banking Co. v. Pettus,* 113 U.S. 116, 127 (1885); *Trustees v. Greenough,* 105 U.S. 527, 537 (1881)]. This requirement was later relinquished so that the Common Fund exception allowed fee recoveries in cases where the plaintiff's action established or preserved a fund, even absent contribution and, moreover, where suit was not brought on behalf of such a class. The *Sprague* decision, in holding that a class action was not an absolute requirement for the Common Fund exception to operate, held that:

> the formalities of litigation . . . should not be a differentiating factor in the exercise of the Court's equitable power to award attorneys fees where a fund has for all practical purposes been created for the benefit of others. (*Sprague* 307 U.S. at 167).

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[3] The *Mills* decision acknowledged that the "Common Benefits" exception evolved from the Common Fund cases. Hence, the two theories, although related, differ in their origin and application (593 U.S. at 608).

Not only was it thus error for the Ninth Circuit to interchange the Common Fund and Substantial Benefit standards, but further the transfer of purely formal requirements from one decision, to confine the court's equitable award in another, where the facts diverge widely, was improper.

The Ninth Circuit itself, in the case of *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135 (9th Cir. 1979) contrary to both the opinion hereunder and the *Imperial Irrigation* decision, fully embraced the liberal guidelines afforded the District Courts in their equitable awards of counsels' fees, holding that the propriety of an award of counsels' fees under either the Common Fund or the Common Benefit exceptions was a matter "within the discretion of the trial judge" (*Id.* at 1140). The *Reiser* decision afforded this liberality even within the context of a Substantial Benefit case.

The *Reiser* court held, moreover, that the imposition of a class action requirement would be inconsistent with the equitable foundations of the exceptions and further stated that "the Court has refused to place form over substance, focusing instead on the actual effect of a plaintiff's suit." (*Id.* at 1139-40)

The imposition herein by the Ninth Circuit of the *Imperial Irrigation* requirement that a class of beneficiaries exist who are in a position to share the cost of litigation especially where the Court overlooked the important fact that the award was stated by the District Court only in terms of the Common Fund is impermissible as inconsistent both with holdings within that Circuit and of this Court. The Ninth Circuit's decision over-

extends the degree of review of equitable award permitted to the Court of Appeal and limits the latitude rightfully granted to the District Court, thereby eviscerating and usurping the equity jurisdiction properly exercised in awarding attorneys fees under the Common Fund exception.

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II

CONCLUSION

A Writ of Certiorari is required in order to correct the Court of Appeals' misapplication of Substantial Benefit standards to prohibit a Common Fund award, to clarify and delineate between these two theories, and to provide guidance to prevent the Courts of Appeal from rendering future decisions which impermissibly constrain the discretion inherent to equity jurisdiction in the Federal Trial Courts.

Absent such review, parties such as the Petitioner herein, who voluntarily and in good faith commit their and their counsel's valuable resources and diligent efforts to the preservation of a fund, will be deprived of compensation. The result will operate to effectively discourage responsible conduct in the course of litigation and to foster neglect and apathy on the part of similarly situated litigants. For the reasons stated above, a Writ of Cer-

tiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

B.P. NORTH AMERICA TRADING, INC.,

Plaintiff-Appellee,

v.

The VESSEL PANAMAX NOVA, etc., et al.,

Defendants,

and

Way Wiser Navigation Corp.,

Claimant-Appellant.

Nos. 84-2671, 84-2767.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 9, 1985.

Decided March 12, 1986.

Supplier filed complaint against vessel and its owner to enforce maritime lien for fuel oil and services provided the vessel. The United States District Court for the Northern District of California, Samuel Conti, J., awarded attorney fees to the supplier. Vessel owner appealed. The Court of Appeals, Duniway, Circuit Judge, held that the supplier was not entitled to recover attorney fees where there was no common fund from which to award the attorney fees as the owner of the vessel was sole beneficiary of the supplier's actions.

Reversed and remanded.

Arthur E. Fisher, Francis S.L. Wang, Lee & Li, San Francisco, Cal., for plaintiff-appellee.

David M. Salentine, San Francisco, Cal., for claimant-appellant.

Appeal from the United States District Court for the Northern District of California.

Before DUNIWAY and REINHARDT, Circuit Judges, and PFAELZER*, District Judge.

DUNIWAY, Circuit Judge:

Claimant-appellant Way Wiser Navigation Corporation (Way Wiser) appeals from the district court's order granting $9,794 in attorneys' fees to plaintiff-appellee B.P. North America Trading, Inc. (B.P.) in a maritime attachment action. We reverse.

FACTS

On August 29, 1984, B.P. filed a complaint against the vessel PANAMAX NOVA and its owner, Way Wiser, to enforce a maritime lien for fuel oil and services provided to the vessel. On September 7, the United States Marshal arrested the PANAMAX NOVA shortly after its entry into San Francisco Bay.

At the time of the arrest, the ship was carrying a cargo of highly volatile soft coal. Its crew had not received pay for approximately nine months and was experiencing severe morale problems. The crew was also running out of food and water. In order to safeguard the welfare of the ship, its cargo and its crew, the U.S.

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*The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

Marshal supplied food, wages, medical services and immigration assistance to the crew and took steps to prevent the volatile cargo from spontaneously combusting. B.P.'s attorneys assisted and supplemented the Marshal's efforts.

On September 26, the PANAMAX NOVA was released when Way Wiser agreed to pay the fuel bills at issue and to reimburse the U.S. Marshal for his costs in caring for the ship and crew during the period of its arrest. Way Wiser also deposited $10,000 with the clerk of the court as security against the court's decision whether to allow B.P. to recover attorneys' fees in the case.

On November 9, 1984, the district court awarded B.P. $9,794 in attorneys' fees. It held that under the special circumstances of the case, B.P.'s "extraordinary services rendered for the protection of the crew and the vessel, as well as the vessel's owner" entitled B.P. to recover the portion of its attorneys' fees it incurred in administrative activities. Way Wiser timely appeals.

STANDARD OF REVIEW

A district court's award of attorneys' fees will be reversed only for abuse of discretion. *Lewis v. Anderson*, 9 Cir., 1982, 692 F.2d 1267, 1269. There is an abuse of discretion when a court bases its decision on an erroneous conclusion of law or when the record contains no evidence on which the court could rationally have based its decision. *In re Hill*, 9 Cir. 1985, 775 F.2d 1037, 1040. The district court's conclusions of law are subject to *de novo* review. *Lewis*, 692 F.2d at 1269. Its findings of fact are reviewed under the clearly erroneous standard. *Id.*

DISCUSSION

The prevailing party in an admiralty case is generally not entitled to an award of attorney's fees, absent statutory authorization. *Delta Steamship Lines v. Avondale Shipyards,* 5 Cir. 1984, 747 F.2d 995, 1011, as modified, 753 F.2d 378; *Noritake Co. v. M/V Hellenic Champion,* 5 Cir., 1980, 627 F.2d 724, 730-31; *American Union Transport Co. v. Aguadilla Terminal, Inc.,* 1 Cir., 1962, 302 F.2d 394, 396; *Mitchell v. Alaska Packers Association,* D. Alaska, 1981, [1982] A.M.C. 2796. The courts have developed several exceptions to this general rule, based on the equitable powers of a court of admiralty, *see Vaughan v. Atkinson,* 1962, 369 U.S. 527, 530, 82 S.Ct. 997, 999, 8 L.Ed.2d 88, or the peculiar nature of admiralty law, *see Delta Steamship,* 747 F.2d at 1011; *Noritake Co.,* 627 F.2d at 730 n. 5. In particular, attorneys' fees can be awarded out of a common fund. *See* E. Benedict, *The Law of American Admiralty* § 424 (6th ed. 1940). In this case, the district court, in awarding attorney's fees to B.P., relied on a combination of the traditional common fund doctrine, and the "substantial benefit" doctrine, which is a recent variation of the common fund doctrine.

These exceptions have a common purpose: to permit a plaintiff to recover a proportionate share of his costs from others who benefit from his efforts without contributing to them. *Mills v. Electric Auto-Lite Co.,* 1970, 396 U.S. 375, 391-92, 90 S.Ct. 616, 625-26, 24 L.Ed.2d 593; *Vincent v. Hughes Air West, Inc.,* 9 Cir. 1977, 557 F.2d 759, 769. They only apply, however, in a few well defined situations. The common fund exception entitles a plaintiff to a fee award only if he has created, discovered, in-

creased or preserved a fund to which others also have a claim. *Alyeska Pipeline Service Co. v. Wilderness Society,* 1975, 421 U.S. 240, 257-58, 95 S.Ct. 1612, 1621-22, 44 L.Ed.2d 141; *Vincent,* 557 F.2d at 769. The award can then be recovered either from the fund or directly from the beneficiaries. *Alyeska,* 421 U.S. at 257, 95 S.Ct. at 1621. The less restrictive substantial benefits doctrine permits the plaintiff to recover attorneys' fees only "where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills,* 396 U.S. at 393-94, 90 S.Ct. at 626-27. *Oldfield v. The Athletic Congress,* 9 Cir., 1985, 779 F.2d 505, 509. The benefit need not be monetary, but must be one that "corrects or prevents an abuse which would be prejudicial to the rights and interests" of the beneficiaries. *Mills,* 396 U.S. at 396, 90 S.Ct. at 627, quoting *Bosch v. Meeker Cooperative Light & Power Assn.,* 1960, 257 Minn. 362, 366-67, 101 N.W.2d 423, 426-27.

To justify an award of fees under either of these exceptions, the target of the award must, at minimum, stand "in such a relationship to the benefited class that the award will 'operate to spread the costs proportionately' and 'with some exactitude' among identifiable beneficiaries of the fee-seeker's success." *United States v. Imperial Irrigation District,* 9 Cir., 1979, 595 F.2d 525, 529 (quoting *Mills,* 396 U.S. at 394, 90 S.Ct. at 626 and *Alyeska,* 421 U.S. at 265 n. 39, 95 S.Ct. at 1625 n. 39), *rev'd in part and vacated in part on other grounds sub nom. Bry-*

ant v. Yellen, 1980, 447 U.S. 352, 100 S.Ct. at 2232, 65 L.Ed. 2d 184. *Vincent*, 557 F.2d at 770-71. Way Wiser does not meet this test. It and it alone was the beneficiary of B.P.'s actions on behalf of its ship. The crew, while beneficiaries of B.P.'s actions, are not in a position to share the costs of an award against their employer. For this reason, they cannot serve as a "class of beneficiaries" within the meaning of either exception. There are no others who will share the cost of the award through the vehicle of a common fund, *see, e.g., Sprague v. Ticonic Nat. Bank*, 1939, 307 U.S. 161, 166, 59 S.Ct. 777, 780, 83 L.Ed.2d 1184 (bondholders); *Trustees v. Greenough*, 1881, 105 U.S. (15 Otto) 527, 532-33, 26 L.Ed. 1157 (beneficiaries of a trust fund); *Vincent*, 557 F.2d at 770-71 (settlements), or a common institution, *see, e.g., Hall v. Cole*, 1973, 412 U.S. 1, 8-9, 93 S.Ct. 1943, 1947-48, 36 L.Ed.2d 702 (award assessed against union shifted costs to union members who benefited from the plaintiff's suit); *Mills*, 396 U.S. at 396-97, 90 S.Ct. at 627-28 (minority shareholder's recovery from corporation shifted fees to all benefited shareholders). Without this sharing of costs among third party beneficiaries, an award against Way Wiser is simply an award against an opposing party, and as such is forbidden by the general admiralty rule.

Because this case is not within one of the established equitable exceptions to the general admiralty rule, "the litigant [B.P.] alone must bear the cost of the enrichment which may flow to others." *Southeast Legal Defense Group v. Adams*, 9 Cir., 1981, 657 F.2d 1118, 1122. The district court, therefore, erred as a matter of law in awarding B.P. attorneys' fees for its administrative services to the PANAMAX NOVA. This error was an abuse of discretion.

The order appealed from is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C 84-6085 SC

(related to Nos. C 84-6267 SC and C 84-6209 SC)

B. P. NORTH AMERICA TRADING, INC.,

Plaintiff,

v.

THE VESSEL PANAMAX, NOVA, et al.,

Defendants.

ORDER GRANTING PLAINTIFF'S APPLICATION FOR ATTORNEY'S FEES

(Filed Nov. 9, 1984)

This matter is before the court on counter motions to resolve whether plaintiff is entitled to an award of attorney's fees in this matter.

This action was commenced on August 29, 1984, by the filing of plaintiff's complaint seeking to recover for fuel delivered to the Panamax Nova. On September 7, 1984, the vessel Panamax Nova was arrested. In late September, the parties settled the matters of the unpaid fuel bills, interest and other related matters, including the crew's unpaid wages. The only issue remaining in this case is plaintiff's application for attorney's fees.

Plaintiff argues that it should be awarded attorney's fees for some of the work done in this case because of unusual circumstances. Plaintiff does not dispute the general rule that, absent statutory or contract authority, attorney's fees are not recoverable by the prevailing party

in civil cases. *See, Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240 (1975). Plaintiff contends, instead, that it should be granted attorney's fees under the "common fund" exception to the general rule.

It is true that the general rule is that attorney's fees are not recoverable absent statutory or contractual authority. A few exceptions to this general rule, however, have been recognized. *See, Alyeska v. Wilderness Society,* 421 U.S. at 245. One of these exceptions is the "common fund" exception. *See, e.g., Alyeska v. Wilderness Society,* 421 U.S. at 245, 257-258; *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1938).

The "common fund" rule is that "the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself" may recover attorney's fees expended to secure such a fund. *Alyeska v. Wilderness Society,* 421 U.S. at 257. This exception is "unquestionably [an assertion] of inherent power in the courts to allow attorneys' fees in particular situations . . . . " *Alyeska v. Wilderness Society,* 421 U.S. at 259.

The court finds that, under the "common fund" exception, plaintiff is entitled to recover a portion of its attorney's fees incurred in this action. The circumstances of this action are exceptional. To begin with, the vessel Panamax Nova had been at sea for some time before she entered the waters close to San Francisco. At that time, the crew had not been paid for some time and had no fresh food on board. Eventually, the vessel's captain brought the ship into the San Francisco harbor. The vessel was immediately arrested in pursuance of this action

and the U. S. Marshal became the vessel's custodian. During the period that the vessel was in the custody of the U. S. Marshal, several actions had to be undertaken to safeguard the welfare of the ship, its crew and the cargo. First, stevedoring and coal expert's services had to be retained to keep the highly volatile soft coal cargo from spontaneously combusting. Secondly, the welfare of the crew had to be considered. The crew had to be given food and necessary medical services, and some action concerning their unpaid wages was undertaken. In addition, the court instructed the Marshal to discover whether the crew was willing to temporarily remain on board while the vessel was under arrest. Negotiations with the crew's U.S. consulate and the Immigration and Naturalization Service were also required.

Plaintiff's attorneys furnished many necessary and beneficial services in carrying out the above actions. One attorney acted also as interpreter for the Marshal, the court and the parties. The attorneys undertook extensive negotiations with the captain, the crew, the crew's consulate, the Immigration and Naturalization Service and others for the benefit of the crew and the vessel. These administrative-type services were not required merely to protect plaintiff's own interest in the vessel or its claim. Rather, these were extraordinary services rendered for the protection of the crew and the vessel, as well as the vessel's owner.

Under these exceptional circumstances, the court holds that plaintiff is entitled to an award of attorney's fees for that part of its attorneys' services which were incurred in administrative-type activities. Upon review of the papers submitted on this motion, the court finds

that the sum of $9,794.00 was incurred for administrative-type services performed by plaintiff's attorneys. Accordingly, the court hereby awards plaintiff the sum of $9,794.00 in attorney's fees.

Defendant Way Wiser Navigation Co. deposited the sum of $10,000.00 into the registry of the court to secure plaintiff's claim for attorney's fees, in accordance with the stipulated Order entered herein on September 26, 1984. That sum was to be invested by the Clerk of the Court in 30-day bank certificates pending the court's order allocating that fund. The Clerk is hereby directed to distribute the fund, as soon as possible after November 28, 1984, the current certificate maturity date, as follows:

1. The Clerk shall issue a check to plaintiff in the sum of $9,794.00;

2. The Clerk shall distribute the remainder of the fund to defendant Way Wiser Navigation Co.

In addition, given that the last remaining issue in this case has now been decided, it is hereby ordered that this action is dismissed.

SO ORDERED.

Dated: November 9, 1984.

/s/ Samuel Conti
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-2671
84-2767
D.C. No. C-84-6085-SC

B.P. NORTH AMERICA TRADING, INC.,

Plaintiff-Appellee,

vs.

THE VESSEL PANAMAX NOVA, etc., et al.,

Defendants,

and

WAY WISER NAVIGATION CORP.,

Claimant-Appellant.

O R D E R

(Filed April 18, 1986)

Before: DUNIWAY and REINHARDT, Circuit Judges, and PFAELZER,* District Judge

The petition for a rehearing is denied.

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*The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

Supreme Court, U.S.
FILED
AUG 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-63

In The
Supreme Court of the United States
October Term, 1986

B.P. NORTH AMERICA PETROLEUM, INC.,
Petitioner,

v.

WAY WISER NAVIGATION CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RULE 28.1 STATEMENT

Respondent Way Wiser Navigation Corp. is a Liberian corporation which has no parent company, subsidiaries, except wholly owned subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

No. 86-63

In The
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October Term, 1986

B.P. NORTH AMERICA PETROLEUM, INC.,
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WAY WISER NAVIGATION CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petition for a writ of certiorari should be denied. The petition raises no issue of the type described in Supreme Court Rule 17 as worthy of consideration by this Court and no special and important reason to take this Court's time.

This Court should award respondent damages under Supreme Court Rule 49.2 for having to respond to a frivolous petition for a writ of certiorari.

Respectfully submitted,

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